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No. 00-730

Supreme Court, U.S.
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In The
SUPREME COURT OF THE UNITED STATES

ADARAND CONSTRUCTORS, INC.,
Petitioner,

v.

NORMAN Y. MINETA, Secretary of Department of Transportation, *et al*
Respondents.

On Writ of Certiorari
To The United States Court of Appeals
For the Tenth Circuit

BRIEF OF L. S. LEE, INC. *AMICUS CURIAE* ON BEHALF OF PETITIONER

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INTEREST OF THE AMICUS CURIAE[1]

This brief is being filed on behalf of L. S. Lee, Inc. ("L. S. Lee"). L. S. Lee is a construction company doing business under its own name or related companies in New York, Delaware, Pennsylvania, Maryland, District of Columbia, Virginia, North Carolina and South Carolina. L. S. Lee is not owned by members of minority races or women who are eligible for certification as disadvantaged business enterprises (DBEs). The *amicus* does business as a contractor which installs guardrail and signs in the highway heavy construction industry and often offers to subcontract to general contractors on federally funded construction projects subject to DBE utilization programs.

States have generally obtained DBE participation through subcontracts let by prime contractors. The prime contractors are expected to meet the state DOT goals by subcontracting with DBE's. DBEs tend to concentrate in specialty areas such as the repair and replacement of signs and guardrail causing disproportionate impact on non-DBE sign and guardrail specialty contractors.

The outcome of this case is of particular interest to the *amicus* because of its exclusion from federal contracts as the result of general contractors fulfilling their DBE goals by hiring DBE specialty contractors.

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[1] This brief was authored by the *amicus* and counsel listed on its cover, and was not authored in whole or in part by counsel for a party. No one other than the *amicus* or its counsel made any monetary contributions to the preparation or submission of this brief. This brief is being filed with the consent of the parties. Their letters of consent have been filed with the Clerk of Court pursuant to Rule 36.2 of the Rules of this Court.

In the experience of this *amicus*, programs of numerical proportionality are not benign. They have a significant negative impact on non-DBE companies. Call it the law of unintended consequences, but the burden of the DBE program falls disproportionately on non-DBE specialty contractors and the program is not narrowly tailored.

The following represents a discussion of the practical day to day issues and consequences of the DBE program and presents the concerns of a non-DBE guardrail contractor.

General Contractors:

(1) Want to subcontract only that work they cannot do with their own forces – they seek to perform as much work as possible with their own forces thus restricting subcontracting opportunities to specialty items such as guardrail and signs.

(2) Don't want to seek waivers from goals.

a. They don't want the risk of losing a job in an atmosphere that sometimes can be coercive; threats of forfeited bid bonds, withdrawal of bidding privileges, etc.

b. They don't want to incur extra expenses seeking the waiver in fear of losing a job they anxiously hope to obtain after having invested time and money in the bidding process.

c. They don't want to risk a time-delay in awarding their contract while waiting for the lengthy waiver process to be completed. This can cost the general contractor money.

State Departments of Transportation "DOT" (Recipients):

(1) Are charged with meeting the goals established by the legislature or the implementing state agency, regardless of achievability. New DBE goals published in the Maryland Register propose a 22.8% goal for the Maryland State Highway Administration. Success is measured in numbers, meeting dollar and percentage goals.

(2) DOTs have a self-interest in keeping long term established DBEs in the program. If DBEs graduate, DOTs cannot produce the numbers the legislature demands.

(3) DOTs do not measure the real capacity of DBE's ability to perform. The aggregate DBE capacity is measured by the number of firms able to get on the approval list, not by the DBE's true capacity to perform a certain amount of work.

(4) Goal setting is often based on the amount of specialty items in a proposed contract. For example, a resurfacing project may involve blacktop paving and guardrail updating with no other items of consequence to subcontract other than guardrail. If the job is bid for $2,000,000.00, the guardrail may be worth $200,000.00 and the DBE "goal" for the project 10%. The process is tilted against the non-DBE specialty contractor from the start.

(5) DBE contractors overconcentrate in specialty items like guardrail. The state DOT's do not know how to remedy this overconcentration. Proposed remedies are being considered, but they inherently will reflect a quota system that disproportionately impacts non-DBE specialty contractors.

How many new DBE specialty guardrail contractors should be substituted for non-DBE's in each market before we say we have enough? How much overconcentration in the guardrail specialty-contracting arena is acceptable?

Non-DBE guardrail contractors die a slow death as they surrender their markets to new DBE competitors that enjoy an edge, and seek not to graduate so they can maintain that edge.

(6) Goals are based on junk science. The so-called disparty studies are often based on anecdotal evidence that evolve into unrealistic numerical goals.

Narrow tailoring remedies have been ineffective:

(1) Sales Limits are set at an three-year average annual limit of $16.6 million, a threshold significantly above the capability of the typical guardrail specialty contractor.

> An industry rule of thumb states that each guard rail crew can generate $1 million in annual sales. In the guardrail industry it is extremely rare to find a guard rail company that operates with 16 crews. Guardrail contractors generally do not stray beyond a 100-mile radius. This is because geography is so important relative to maintaining competitive mobilization and travel costs. Within this 100 mile radius, there are no $30 million guard-rail markets (a competitor would have to reach a greater than 50% market share to exceed the size limit).
>
> The end result is that the $16.6 million-dollar limit is totally ineffective and irrelevant as a narrow tailoring remedy. Even if the limit were relevant, why wouldn't a new or established DBE competitor be careful to manage his three-year annual volume to be less than the $16.6 million limit?

(2) Net worth limits are ineffective. The $750,000 limit on net worth excludes the owner's residence and excludes net worth in the business. The DBE program

has seen many professional lawyers, engineers and wives join this program to take advantage of the preference system, even if they have not been subject to racial or ethnic prejudice or cultural bias, because they were presumed to be in a group that was disadvantaged. What if they live in a mansion? What if they distribute their net worth to their children? What if they transfer business ownership to their wives to get their status? Based on recent demographic data from the US Census $750,000.00 is not disadvantaged. The effect of this is to extend preferences to non-disadvantaged members of privileged groups, who like most small business owners have disproportionate amounts of their equity in their homes and businesses.

(3) Waivers are represented as easy to obtain. They are not. General contractors do not want to get involved with the risk factors, costs, and time delays associated with securing a waiver. Non-DBE specialty contractors are forced to present more than a low bid to secure jobs. They need to be "extra low" to induce the general contractor to seek a waiver.

(4) DBE contractors do not have to meet subcontracting DBE goal requirements when they compete for prime (direct bid to owner) contracts. Another example of disproportionate impact on non-DBE specialty contractors who must subcontract and incur the additional costs of subcontracting with their DBE competitors on prime jobs.

(5) Graduation – does not happen because size and net worth are managed to maintain the DBE preference. Every three years DBEs are simply required to recertify. If they can stay under the size and net worth requirements (net of the generous exclusions), they continue to be certified indefinitely. Neither the DBEs nor the state DOTs want graduation. In North Carolina, two DBE guardrail subcontractors dominate the market. One Company is operated by a successful male businessman and they enjoy

preferential status because his sister owns the Company and she is automatically deemed economically disadvantaged. The other Company is run by two male (children) whose Mother owns the Company. These companies have been in the program for many years, they manage their affairs to maintain their status, and have no foreseeable reason to exit the program.

Unfortunately, the record in this case is inadequate to permit an argument that the program at issue is not narrowly tailored by reason of its disproportionate impact on the non-DBE firms. This is due to the inability of the *amicus* to pry this information loose from the public record based on both cost and accessability. But the disproportionate impact does affect the interests of this *amicus*. The *amicus* is frustrated by lack of remedy. In order to launch a lawsuit it is very difficult to establish standing and we risk offending our customers and retaliation. Lawsuits are prohibitively expensive because they know "we will outlast you". Further, general contractors have learned to work around the problem and do not worry about the plight of the non-DBE specialty contractor.

STATEMENT OF THE CASE

Amicus adopts the Petitioner's Statement of the case.

SUMMARY OF ARGUMENT

In *Adarand Constructors, Inc. v. Slater*, 528 U.S. 216 (2000) ("*Adarand VI*"), this Court remanded the case a second time for the lower courts to rule on the existence of a compelling interest and narrow tailoring of the remedy.

In answering both questions in the affirmative, the Court of Appeals relied on the sufficiency of the Report, "Appendix. The Compelling Interest For Affirmative Action In Federal Procurement," 61 Fed. Reg. 26,060 (1996). ("The Compelling Interest"). Thus, this Court is in a position to rule whether the conclusions in "The Compelling Interest" justify "affirmative action" in the form of a preference program based on numerical proportionality.

This case also affords the opportunity for the Court to rule whether an over-broad program of numerical proportionality is narrowly tailored to withstand strict scrutiny.

This brief will address the issue of narrow tailoring.

The brief will discuss the various devices said to narrowly tailor the DBE program. It concludes that these attempts are without substance.

ARGUMENT

I.

NUMERICAL PROPORTIONALITY BASED ON RACE IS NOT A NARROWLY TAILORED REMEDY FOR SOCIETAL DISCRIMINATION

The Court of Appeals identified the underlying policy to be implemented by the statutory framework and the Subcontractor Compensation Clause ("SCC"):

> The [SBA] . . . declares it to be "the policy of the United States that small business concerns, [and] small business concerns owned and controlled by socially and economically disadvantaged

> individuals, . . . shall have the maximum practicable opportunity to participate in the performance of contracts let by any Federal agency." [Small Business Act] § 8(d)(1), 15 U.S.C. § 637(d)(1).

App. at 15.

The Court of Appeals referred to the program as one of "numerical proportionality" and found that numerical proportionality requirements based on race in Federal contracts are narrowly tailored to remedy past societal discrimination App. at 65.

The *amicus* submits that it is not a permissible remedial purpose to create a system of race-based preferences designed to achieve participation to the maximum practicable extent by race-designated companies in Federal contracting.

The Court of Appeals reached the conclusion that the programs at issue were narrowly tailored based on its analysis of the factors identified in *United States v. Paradise*, 480 U.S. 149 (1987). (App. 54-55).

Adarand makes a compelling argument that the government has not identified discrimination with the specificity that justifies any race-based remedy. The necessity for any race-based "remedy" in this case is far less specifically identified than the hiring criteria approved in *Paradise*[2] and reaffirmed in *Adarand III*, 515 U.S. 200, 237.

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[2] *Paradise* involved a judicial remedy imposed on an offender, not a legislative enactment imposing a racial preference on the community at large. The judicial remedy for a proven violation of law will often include commands that the law does not impose on the community at large. *Teachers v. Hudson*, 475 U.S. 292, 309-10 n. 22 (1986).

There are many reasons the program fails to be narrowly tailored. The fundamental problem is that the list of presumptively eligible groups is over inclusive.

A citizen or legal resident who can show ancestry or identify with one of the following groups is presumptively eligible under federal regulations:

> Black Americans; Hispanic Americans; Native Americans (American Indians, Eskimos, Aleuts or Native Hawaiians); Asian Pacific Americans (persons with origins from Burma, Thailand, Malaysia, Indonesia, Singapore, Brunei, Japan, China (including Hong Kong), Taiwan, Laos, Cambodia (Kampuchea), Vietnam, Korea, The Philippines, U.S. Trust Territory of the Pacific Islands (Republic of Palau), Republic of the Marshall Islands, Federated States of Micronesia, The Commonwealth of the Northern Mariana Islands, Guam, Samoa, Macao, Fiji, Tonga, Kiribati, Tuvalu, or Nauru); Subcontinent Asian American (persons with origins from India, Pakistan, Bangladesh, Sri Lanka, Bhutan, the Maldives Islands or Nepal).[3]

Congress initiated this list,[4] but the SBA has been delegated and has actively applied the authority to decide whether to add groups.[5]

In 1980, dissenting Justices of the Supreme Court first raised this issue in *Fullilove v. Klutznick*.[6] Justice

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[3] 13 C.F.R. § 124.103(b).

[4] *See* 15 U.S.C. § 637(d)(3)(c); 10 U.S.C. § 2323(a)(1).

[5] 13 C.F.R. § 124.103(b).

[6] 448 U.S. 448 (1980) (upholding the use of racial and

Stewart dealt specifically with the issue of the fairness of the manner in which groups were chosen for preferences. Justice Stewart commented:

> In today's society, it constitutes far too gross an oversimplification to assume that every single Negro, Spanish-speaking citizen, Oriental, Indian, Eskimo, and Aleut potentially interested in construction contracting currently suffers from the effects of past or present racial discrimination. Since the MBE set-aside must be viewed as resting upon such assumption, it necessarily paints with too broad a brush.[7]

It was not until *City of Richmond v. J.A. Croson*[8] in 1989, that a majority of the Supreme Court adopted the position that the Constitution required justification for the inclusion of each separate group granted preferences for the groups recognized in *Fullilove*.[9] Justice O'Connor wrote:

> The random inclusion of racial groups, that, as a practical matter, may never have suffered from discrimination in the construction industry in Richmond suggests that perhaps

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ethnic classifications in the Public Works Employment Act of 1976).

[7] *Id.* at 530 (Stewart, J., Dissenting).

[8] 488 U.S. 469 (1989).

[9] *See id.* at 506. Justice Powell expressed concern that the "University [was] unable to explain its selection of only four favored groups – Negroes, Mexican-Americans, American Indians and Asians – for special treatment. The inclusion of the last group [was] especially curious in the light of the substantial numbers of Asians admitted through the regular admissions process." *Regents of the Univ. of California v. Bakke*, 438 U.S. 265, 309 (1978).

> the city's purpose was not in fact to remedy past discrimination . . . . The gross overinclusiveness of Richmond's racial preferences strongly impugns the city's claim of remedial motivation.[10]

The Court noted that Richmond's adoption of the federal group categories for presumptive eligibility was in the context of a situation in which There is *absolutely no evidence* of past discrimination against Spanish-speaking, Orientals, Indians, Eskimos, or Aleut persons in any aspect of the Richmond construction industry . . . . It may well be that Richmond has never had an Aleut or Eskimo citizen."[11]

Firms owned by persons identifying with these groups or who are women can be classified as disadvantaged business enterprises (DBEs) whether the firms are new or old, successful or unsuccessful. Firms owned by men who are not members of the above groups must show by a preponderance of evidence standard that their owners have suffered chronic racial or ethnic prejudice or cultural bias.[12]

The rules for determining individual social and economic disadvantage are set out in 13 C.F.R. 26, Appendix E to Part 26. As these rules state, they are adopted with minor modifications from SBA regulations concerning social and economic determinations.[13] If a person is socially disadvantaged, he or she will also be presumed to be economically disadvantaged, unless the person exceeds generous net worth standards.

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[10] *Croson*, 488 U.S. at 506.

[11] *Id.*

[12] 63 Fed. Reg. 35, 726-735 (1998).

[13] 13 C.F.R. 124.103(c) and 124.104.

U.S. DOT has stated, "The DBE program is not now, nor was it ever intended to deal solely with economic disadvantage . . . . The intent is clear from the original statutory language of the program which provided presumptive eligibility for certain qualified members of minority groups that have faced discrimination based upon their race in the construction industry throughout the history of the United States." ("DOT's New Disadvantaged Business Enterprise Final Rules," Question: if this program is about economic disadvantage why does it have to consider race?") To the contrary, the creation of the presumptively eligible racial and ethnic groups by Congress and the SBA never had any particular relationship to the construction industry. The same group list is used for all federal race and ethnic-based contracting preference programs which cover, at one time or another, everything the federal government purchases. What should be government aid to businesses with credit problems becomes a contract preference program.

The problem that this *amicus* has experienced is that all attempts to remedy these fundamental flaws by further attempts at narrow tailoring have failed.

DOT published the final regulations for its DBE program on February 2, 1999. 49 CFR Part 26, replaced most of Part 23. The stated purpose:

> The DBE program is intended to remedy past and current discrimination against disadvantaged business enterprises, ensure a level playing field and foster equal opportunity in DOT-asserted contracts...

Id. In fact the program does none of these. The program basically leaves all problem-solving to the "recipient".

Personal Net Worth 49 CFR Sec. 26.67. "Economic Disadvantage" is determined by imposing a cut-off of $750,000, exclusive of personal residence and the value of the business.

The $750,000 statutory presumption of ineligibility means that (even based on individual net worth rather than family net worth) 91% of business owners would be eligible to participate. See "The Small Business Administration's Minority Business Development Program," Hearing Before the Senate Commission on Small Business, 104th Cong. 42 (1995).

This means that the actual screening criteria for almost everyone are the racial and ethnic presumptions of social disadvantage.

Overconcentration 49 CFR §26.33. The "Interest of the Amicus" describes the problem of overconcentration of DBEs in specialty areas. DOT stated that it lacked data to support a finding of overconcentration. *Id.* (The GAO described the problem in its study "U.S. General Accounting Office Report to Congressional Committees." August, 1994, "Highway Contracting, Disadvantaged Business Program Meets Contract Goal, But Refinements Are Needed," GAO/RCED 94-168:

> "For example, with one exception, DBEs received 26 percent or more of the contract dollars awarded in each of these three areas in all four states [Colorado, Connecticut, Georgia, and Wyoming]. In each state, DBEs received 49 percent or more of the contract dollars awarded in at least two of the three areas. DBEs received 86 percent of the landscaping and 90 percent of the fencing and guardrail contract dollars in one state and 100 percent of the traffic control contract dollars in another."

Id. at 11, 24.

DOT's response to the problem was to provide:

> While recipients would have to obtain DOT approval of determinations of over-concentrations and measures for dealing with them, the Department is not prescribing any specific mechanisms for doing so.

49 CFR §26.33.

Not only does DOT provide no guidance to recipients but it imposes a requirement of federal approval of individual decisions. The approval becomes part of the recipient's DBE program. 49 CFR §26.33. Obtaining approval requires cooperation of prime contractors and state DOTs. That unworkable process guarantees zero attention to overconcentration.

Goal Setting DOT's regulations on goal setting make a chimera of the concept of narrow tailoring.

The principal highway aid program is the Transportation Equity Act for the 21st Century, Pub.L. No. 105-178, ("TEA-21"). Regulations are set forth in 64 Fed. Reg., 5096.

As a condition of receiving TEA-21 funds, states are required to set a goal for DBE utilization that reflects what utilization would be absent discrimination. This requires an accurate assessment of the DBEs and non-DBEs performing construction services for a particular recipient. If that assessment is inaccurate, then the goal which triggers a state's race-conscious efforts will be wrong as well. Since in *Croson* and subsequent cases, the judicial rule has been that the comparison should be between minority and women-owned firms that are comparably "qualified,"

"willing and able to perform a particular service" to non-minority and non-women owned firms.[14]

"Qualified," "willing" and "able" are the three pillars of the *Croson* test; a fortiori, a municipality may not enact race-based remedial measures unless it determines that qualified, willing and able minority contractors have been excluded from participating in public contracting.

See also *Concrete Works v. City of Denver*, 36 F.3d 1513, 1528, (10th Cir. 1994). ("[W]here special qualifications are necessary, the relevant statistical pool for purposes of demonstrating discriminatory exclusion must be the number of minorities *qualified to undertake the particular task*." (emphasis is original); *Associated General Contractors v. Drabik*, 214 F.3d 730, 736 (6th Cir. 2000) (faulting a statistical comparison for not taking into account the percentage of minority-owned businesses that "were qualified, willing and able to perform state construction contracts"). The need to compare qualifications in measuring disparities is well-established in the social sciences and cases. See, for example in employment; *Hammon v. Barry*, 813 F.2d 412, 427, n.31 (D.C. Cir. 1987); *Long v. City of Saginaw*, 911 F. 2d 1192, 1199 (6th Cir. 1992); and *Aiken v. City of Memphis*, 37 F.3d 1155, 1165 (6th Cir. 1994); and college scholarships (*Podberesky v. Kirwan*, 38 F.3d 147, 156 (4th Cir. 1994).

The U.S. DOT regulations mimic the "qualified," "willing and able" standard, but do not adopt or enforce it. First, the regulations drop the concept of qualifications altogether and substitute the term "ready"; a term that has no particular meaning. In fact, there are often very significant qualifications (bonding, licenses, experience, equipment,

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[14] *Croson,* 488 U.S. at 509. As the District Court said in *Contractors Association of Eastern Pennsylvania v. City of Philadelphia*, 893 F. Supp. 419, 432 (E.D. Pa. 1995).

etc.) attached to bidding for construction contracts. Second, although the regulations preserve *Croson's* "willing and able" language, U.S. DOT has not defined those terms. Without definition, as is clear from this case and as the regulations themselves state, DOT permits the calculation of goals using data bases (such as census data, Dunn & Bradstreet data, and membership lists) that do not define and have no information on which firms are "qualified," "willing and able" to perform highway construction services. Third, U.S. DOT permits the inclusion of firms that are not DBEs to be counted in shaping a recipient's annual DBE goal. DBEs are firms that have sought state certification because they seek the benefit of being counted to meet DBE goals. Only certified DBEs can be counted to meet DBE goals. DBEs must meet the net worth ownership, size limitations, and other requirements. Most minority and women-owned construction firms have not sought or attained DBE certification. They may not be interested in highway work, or they may not have the qualifications or may not meet the net worth and size limitations, or they may not believe in obtaining work through racial, ethnic or gender preferences. Nevertheless, U.S. DOT permits these minority and women owned firms that are not DBEs to be counted in measuring availability, even as the Department forbids their being counted in utilization. This is obviously a double standard that adds to the unfairness of DBE goals.

While U.S. DOT was bound statutorily to preserve the concept of the presumption of social and economic disadvantage, it made regulatory decisions that have turned that presumption into a racial, ethnic and gender entitlement. First, it made no attempt to reexamine the list of racial and ethnic groups developed by SBA that carry the presumption of social disadvantage or to ask SBA to reexamine the list. SBA's group decisions pre-date *Croson*, let alone *Adarand*, and there has been no reexamination despite the criticism of the overinclusive nature of the list by many courts. Second, with the exception of granting a waiver to Colorado during

the *Adarand* litigation, U.S. DOT has not permitted states to set group-specific goals.

Obviously, if DBEs are not comparably "qualified, willing and able," then any disparities in their utilization and that of non-DBEs may be caused by the difference in qualifications, willingness and ability, not discrimination.

II.

THE SCC AND THE DBE PROGRAM SHOULD BE ENJOINED BOTH AS TO WOMEN-OWNED AND MINORITY OWNED DISADVANTAGED BUSINESSES

The *amicus* suggests that the judgment should be reversed with final judgment ordered Adarand. The government articulated its findings in the record below. There is no suggestion that the program is remedial or narrowly tailored to affect a compelling interest.

The *amicus* have no objection to small business aid programs involving competitive bidding without racial classifications.

If the SCC and the DBE programs are enjoined only as to racial minorities, the effect will be to leave it in force as to women-owned DBEs ("WBEs"). Thus the governmental agency would still have a 5% statutory goal and a 12-15% DBE goal which would be satisfied primarily by women-owned businesses.

The *amicus* suggests that the WBE component of the statute is such an integral part of the program that it should be enjoined as part of the remedy fashioned by the court.

> If different sections of a statute are independent of each other, that which is unconstitutional may be disregarded, and valid sections may stand and be enforced. But if an obnoxious section is of such import that the other sections without it would cause results not contemplated or desired by the legislature, then the entire statute must be held inoperative.

Connolly v. Union Sewer Pipe Co., 184 U.S. 540, 565 (1902). Even when Congress has included a separability clause, the court eschews giving the statute "an effect altogether different from that sought by the measure viewed as a whole." *Carter v. Carter Coal Co.*, 298 U.S. 238, 313 (1936).

Section 502 of the Small Business Act proscribes a minimum DBE participation goal of 5% of the total value of all prime contract awards. 15 U.S.C. § 644(g)(1). The participation minimum is expressed in the aggregate: Congress did not specify how much of the goal must be comprised of minority-owned versus women-owned business, but clearly contemplated a mixture of both. Because the participation goal has been expressed as an aggregate and not distinctly allocated between minority-owned and women-owned businesses, the provisions of the SCC and DBE as they apply to racial minorities and women are interdependent, and must both be stricken if one is found unconstitutional.

CONCLUSION

DOT has abandoned any effort to narrowly tailor the DBE program.

Respectfully submitted,

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